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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 196

SANFORD J. MOORE, SHERWOOD SCHWACH AND ALLEN KERNER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–2a) has not been reported.

JURISDICTION

The judgment of the court of appeals was entered May 18, 1961 (R. 57). On June 12, 1961, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to July 1, 1961. The petition for a writ of certiorari was filed June 30, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether it was an abuse of discretion for the district court to deny a motion to withdraw a plea of guilty, made on the day set for sentencing but before sentence was imposed, where the plea had admittedly been voluntarily entered with full knowledge of the consequences, and no valid reason was advanced for withdrawal.

RULE INVOLVED

Rule 32(d), F.R. Crim. P., provides:

> A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

STATEMENT

Petitioners were indicted in the United States District Court for the Eastern District of New York on three counts charging (1) concealing from the receiver and trustee in bankruptcy of the Gibraltor Amusements, Ltd., 203 coin operated music machines worth approximately $100,000, which were property belonging to the estate of the bankrupt; (2) transferring in contemplation of bankruptcy approximately 73 machines; and (3) conspiracy (R. 2–5). On March 9, 1961, their counsel reported that, against his advice, the petitioners wished to plead guilty (R. 6, 7). Before accepting the plea, the court assured itself that petitioners knew their rights; knew that they could be sentenced to imprisonment; and

were acting without threat or promise to induce them to plead (R. 10-13). The court then set March 30 as the date for sentencing (R. 12).

On the day set for sentencing, counsel, without offering any affidavits by petitioners, stated that petitioners wished to withdraw their pleas. Counsel said that he had on March 22 argued in the court of appeals an appeal from the adjudication in bankruptcy, and that should that adjudication be reversed, the indictment would have to fail (R. 15–16).[1] Counsel admitted that petitioners knew what they were doing when they pleaded guilty, but stated that they ought to be allowed to defend themselves (R. 18–19). The court (which had a pre-sentence report, since the plea of guilty had previously been accepted) noted that it saw no reason to "grant this application * * * in the light of all that has occurred since the plea was entered, and which prompts me to refer to the reason for the application as being palpable" (R. 18). The court stated that it believed that it did have more information than counsel with respect to certain phases of the matter, and added, "but I am not confining it to that" (R. 25). Counsel then again reverted to the possibility that the adjudication would be set aside (R. 28–30). Beyond that the reason given for the requested change of plea was the effect on petitioners' families (R. 32–33). The court said (R. 34–35):

> Absent a good sound reason for the granting of an application of this kind, I am compelled to

[1] The adjudication was affirmed on May 24, 1961.

> deny it because of the fact that these are intelligent men who were well represented by experienced and capable counsel, who knew exactly what they were doing, who in answer to questions asked them, stated that the act was their voluntary act, and that they were made no promises and no threats, in order to induce them to enter a plea.
>
> Now, those positive answers to those questions is to me proof positive that they knew what they were doing all the time.

When counsel urged that, if the adjudication in bankruptcy should be reversed, there would be no crime, the court stated that in such event 28 U.S.C. 2255 would be available to correct the error (R. 42–44). The court denied the motion for a change of plea, stating (R. 47):

> I think you have not laid what I regard as an adequate and proper basis for the granting of leave to withdraw their pleas of guilty, and to enter pleas of not guilty.

Before sentencing the petitioners, the court asked if any of them wished to make a statement, and each replied in the negative (R. 47). The court mentioned some of the information disclosed by the pre-sentence report—that by "very clever" devices the petitioners were able to dispose of the machines, possibly by shipment to England (R. 48–49). He then sentenced petitioners as follows: concurrent sentences on each of the three counts of three years' imprisonment for Moore, two years for Schwach and fifteen months for Kerner (R. 49–50).

The court of appeals, in affirming the action of the

district court denying leave to withdraw the plea of guilty, noted that not only was there no denial that petitioners entered their pleas voluntarily and knowingly, but that no direct affidavits from the petitioners were offered, only counsel's assertions and hearsay (Pet. App. 1a–2a).

ARGUMENT

Petitioners do not in this Court rely upon the argument made by counsel before the district court on the motion to withdraw the pleas, that the possibility that the adjudication in bankruptcy might ultimately be reversed would exonerate them of guilt. They apparently realize that, since the district court had jurisdiction of the petition in bankruptcy and authority to appoint a receiver to take over the assets of the bankrupt estate pending adjudication, knowing concealment of assets of the estate is an offense, regardless of the validity of the bankruptcy adjudication. *United States* v. *Agresti*, 130 F. 2d 152 (C.A. 2); *United States* v. *Kramer*, 279 F. 2d 754 (C.A. 3), certiorari denied, 364 U.S. 879.[2] Beyond this, the only reason offered for the change of plea was the effect on petitioners' families, hardly a matter about which petitioners could have been unaware at the time they knowingly pleaded guilty. It is significant that, be-

[2] Petitioners now argue that a reversal of the adjudication might affect the attitude of the prosecution or the sentence of the court (Pet. 11, fn. 5). They point to the fact that on the hearing reference was made to the procedure for reduction of sentence. It is evident, however, that the prosecutor and the judge, who had apparently not expected the motion to withdraw, were merely accepting arguendo defense counsel's statement of the law.

fore sentencing, when petitioners were asked by the court if any of them had anything to say, none of them made any statement. Petitioners' position reduces itself to the proposition, therefore, that because their motion to withdraw was made by counsel in their behalf before sentencing, it was an abuse of the discretion of the district court to deny the application, even though no reason for the change of plea was offered. In other words, their argument would withdraw all discretion from the district court with respect to a motion to withdraw a plea of guilty before sentence.

Rule 32(d), in providing for a "motion" to withdraw a plea of guilty, obviously contemplates that there be discretion in the district court to grant or deny the motion. Motions to withdraw pleas of guilty before sentence are considered with more liberality than such motions made after sentence has been imposed, but even so the grant or denial of the motion rests in the sound discretion of the court. Petitioners point to no case in which the denial of a motion to withdraw before sentence was deemed an abuse of discretion where there was as searching an inquiry before the plea was accepted as was made here, and where there was as little explanation of any reason for the motion to withdraw. On the contrary, there are a number of cases in which denials of motions to withdraw, on stronger showings than were made here, have been upheld. See *High* v. *United States,* 288 F. 2d 427, 431 (C.A.D.C.), certiorari denied, 366 U.S. 923; *Vasquez* v. *United States,* 279 F. 2d 34 (C.A. 9); *United States* v. *Pane-*

bianco, 208 F. 2d 238 (C.A. 2), certiorari denied, 347 U.S. 913.

A plea of guilty is a solemn act, not to be entered by a defendant either lightly or tentatively, not to be accepted by a court without assurance that it is made knowingly and voluntarily (Rule 11, F.R. Crim. P.); its significance will be diluted if it can be changed indiscriminately. Moreover, there is administrative reliance on the entry and acceptance of a guilty plea, such as in the management of the court's calendar and in the development of a pre-sentence report under Rule 32(c). None of these considerations may be sufficient to outweigh the right of a defendant to change his plea when he shows some valid reason for his motion to withdraw, but they are sufficient to justify the requirement, which all the cases recognize, that, after a plea of guilty has been knowingly and voluntarily entered, a defendant who moves to withdraw the plea must offer some reasonable basis for his motion. That these petitioners failed to do.

Petitioners argue that because the judge, who had obviously read the pre-sentence report, said that he could surmise the reason for the change of plea, this shows that he acted on the basis of undisclosed knowledge. But the judge in his ultimate ruling made it clear that the basis for his ruling denying the motion to withdraw was that petitioners had not made an adequate showing to support their motion (R. 47). And since petitioners personally made no showing at all, and their counsel in their behalf offered (in addition to the legal argument no longer

pressed) only the statement that petitioners had come to realize what the plea meant to their families, this ruling was clearly correct. There is no occasion for this Court to review the exercise of discretion by the trial judge which has been upheld by the court of appeals.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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